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was legally "certain," *i.e.*, it could be made certain by accurate survey based upon the muniments of title. Hence, when the appropriate case of true objective uncertainty does arise,[26] North Carolina counsel would seem to have had the door opened wide enough by the *Andrews*[27] dictum to argue persuasively for outright adoption of the majority rule allowing enforcement of parol agreements in such cases.[28] Such a result would accord with generally accepted public policy considerations.[29]

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Charitable Trusts—Application of Cy Pres to a Discriminatory Trust

In a recent New Jersey decision[1] the *cy pres* doctrine[2] was

Tallassee Power Co., 204 N.C. 274, 168 S.E. 217 (1933), lacked the requisite objective uncertainty as the court found the deeds were not ambiguous and the boundary line could be made certain. Whether the uncertainty present in Kirkpatrick v. McCracken, 161 N.C. 198, 76 S.E. 821 (1912), was objective in nature is inconclusive on the facts and opinion. In any event, evidence of the subsequent parol agreement was admitted, although the court said it felt the trial court had confined the evidence to the restricted purpose of establishing damages.

[26] And when counsel on trial is astute to make the record show that there *is* objective uncertainty involved. It seems at least possible from reading our cases that the absence up to now of clear analysis along the lines suggested may be the result of failure by counsel clearly to develop this critical point for the appellate records.

[27] Andrews v. Andrews, 252 N.C. 97, 113 S.E.2d 47 (1960).

[28] It is unlikely that any of the parol agreements litigated in the past were the result of specific counsel by lawyers. Of course, in the rare instance where the lawyer's advice is sought ahead of time, the correct counsel is to enter into a written and recorded boundary line agreement, whether the dispute arises out of objective or merely subjective uncertainty.

[29] "These settlements of disputed, conflicting, or doubtful boundaries should be encouraged by the courts as a means of suppressing spiteful and vexatious litigation, and thus banishing from peaceful communities a fruitful source of discord. 'Convenience, policy, necessity, justice—all unite in sustaining such an amicable agreement.'" McArthur v. Henry, 35 Tex. 801, 816 (1869). Quoted with approval in Sobol v. Gulinson, 94 Colo. 92, 95, 28 P.2d 810, 811 (1933).

[1] Howard Sav. Inst. v. Peep, 34 N.J. 494, 170 A.2d 39 (1961).

[2] The *cy pres* doctrine is an equitable doctrine applied to prevent the failure of a charitable trust when the settlor's scheme is, or has become, impractical, impossible, or illegal to carry out. It is based on the presumption that his wishes will more nearly be fulfilled by alteration of the trust and its application to a purpose "as near as possible" to his original intent, rather than declaring a partial intestacy. See, *e.g.*, Petition of Pierce, 153 Me. 180, 188, 136 A.2d 510, 515 (1957). See generally 2A BOGERT, TRUSTS AND TRUSTEES §§ 431-41 (1953); FISCH, THE CY PRES DOCTRINE IN THE UNITED STATES (1950); RESTATEMENT (SECOND), TRUSTS § 399 (1959); 4 SCOTT, TRUSTS §§ 399-.5 (2d ed. 1956); SHERIDAN & DELANY, THE CY-PRES DOCTRINE (1959). The doctrine has gained wide acceptance in the

applied to strike the words "Protestant" and "Gentile" from a testamentary charitable trust. The trust was to provide scholarship loan funds for "deserving American born, Protestant, Gentile boys of good moral repute not given to gambling, smoking, drinking or similar acts" at Amherst College. The college was to act as trustee. Since its charter expressly forbids discrimination among its students or faculty on religious grounds,[3] the trustees of the college refused to serve as trustees or to co-operate with any substituted trustee.

The court found the designated purposes to be sufficiently broad to create a charitable trust,[4] the primary object of the testator's bounty to be Amherst College rather than students of a particular religious persuasion,[5] and held that under the circumstances administration of the trust by a substituted trustee would be impracticable.[6]

Prior to the principal case, there have been at least three instances in which a court of equity has been requested to apply the *cy pres* doctrine to delete discriminatory provisions from charitable

United States, but has been rejected in North Carolina. Board of Educ. v. Town of Wilson, 215 N.C. 216, 1 S.E.2d 544 (1939). *But see* Johnson v. Wagner, 219 N.C. 235, 13 S.E.2d 419 (1941). See also FISCH, *supra* at § 3.02; Note, 27 N.C.L. REV. 591 (1949).

[3] MASS. GEN. LAWS ch. 84, § 6 (1824).

[4] The court took the position that the " 'general charitable intent' ordinarily used by the courts articulating the doctrine does not require an intention to benefit charity generally. It requires only a charitable purpose which is broader than the particular purpose the effectuation of which is impossible, impractical or illegal." Howard Sav. Inst. v. Peep, 34 N.J. 494, 501, 170 A.2d 39, 43 (1961). In support of the foregoing statement the court cited RESTATEMENT, TRUSTS § 399, comment *c* (1935), which does not support it. Bogert argues that the whole concept of general charitable intent is really a fiction used to rationalize a desired result. 2A BOGERT, *op. cit. supra* note 2, at § 436. That seems to be the case here. See note 21 *infra*.

[5] The court considered the testator's life-long interest in Amherst, his contributions to alumni fund drives, attendance at class reunions, etc. The court thus removed from consideration the possibility of settling the trust on another institution willing to observe its restrictions. *Compare* this *with* Noel v. Olds, 138 F.2d 581 (App. D.C. 1943), *cert. denied*, 321 U.S. 773 (1944) (the Ackland Museum case), where evidence of the same nature was excluded. See also Note, 27 N.C.L. REV. 591 (1949).

[6] *But cf.* Barclay Estate, 18 Pa. D. & C.2d 489 (Orphans' Ct. 1959), where the testatrix' intent was to assist German university students from a particular area of Germany. Under German law a university was not capable of accepting or administering a trust limited to a specially designated class of beneficiaries. The trust did not fail but the court devised a scheme for appointment of private trustees to administer the fund in accord with the testatrix' wishes. The dissenter in the principal case thought the difficulties of administration by a substituted trustee were not insurmountable. Howard Sav. Inst. v. Peep, 34 N.J. 511, 170 A.2d 48 (1961).

trusts,[7] but only in *In re Dominion Students' Hall Trust*,[8] an English case, has the attempt succeeded. This case involved a trust devoted to the maintenance of a hostel for the benefit of male students of "European origin" from overseas dominions of the British Empire. The *cy pres* doctrine was applied to delete the discriminatory restriction, for it was felt that it tended to defeat the primary object of the trust by antagonizing the very students whom the charity sought to benefit.[9]

The leading American case in which this issue was raised is *Girard Will Case*.[10] Girard's will limited the beneficiaries of his bounty to "poor, white male orphans," and named the City of Philadelphia as trustee. In 1954 two Negro boys were denied admission to Girard College solely on the ground that they were not white. Suit was brought against the Board of Directors of City Trusts. The Mayor of Philadelphia and the Attorney General of Pennsylvania intervened as co-plaintiffs. One of the arguments before the Orphans' Court[11] was that the "white" restriction was against the public policy of Pennsylvania and the United States, and that the

[7] The question of what to do about religious restrictions in a trust usually arises where the fund has become inadequate to carry out the testator's purpose, or where the designated trustee has ceased to exist. See, *e.g.*, Matter of MacDowell, 217 N.Y. 454, 112 N.E. 177 (1916) (insufficient funds); People *ex rel.* Smith v. Braucher, 258 Ill. 604, 101 N.E. 944 (1913) (trustee no longer in existence). See generally Annot., 3 A.L.R.2d 78 (1949). Religious restrictions were completely ignored in First Trust Co. v. Thompson, 147 Neb. 366, 23 N.W.2d 339 (1946); *cf.* Application of Italian Benevolent Inst., 157 N.Y.S.2d 485 (Sup. Ct. 1956). *But see In re* Rupprecht's Will, 271 App. Div. 376, 65 N.Y.S.2d 909 (1946), *aff'd without opinion*, 297 N.Y. 462, 74 N.E.2d 175 (1957); Petition of Rochester Trust Co., 94 N.H. 207, 49 A.2d 922 (1946).

[8] [1947] Ch. 183 (1946). See Note, 14 SOL. 140 (1947). See also *In re* Queen's School, [1910] 1 Ch. 796. The school's endowment trust required the head mistress to be a communicant of the Church of England. In order to obtain government aid the trustees requested the court to delete this provision. The suit was successful, but through alteration of a previous *cy pres* scheme drawn by the Charity Commissioners in 1900.

[9] [1947] Ch. at 186. It is submitted that this decision was not cited in the principal case because *Dominion Students* did not involve a testamentary trust but one created by private subscription, and it appeared that at least seventy-five per cent of the subscribers favored deletion of the "European" restriction. There was, therefore, no substantial question of what the settlor of the trust would have preferred had he foreseen a failure of the purpose of his trust. The court's path in *Dominion Students* was also smoothed by the fact that it was not actually an adversary proceeding. Although the Attorney General was the nominal defendant, he argued in support of the plaintiff's petition. *Id.* at 185-86.

[10] 386 Pa. 548, 127 A.2d 287 (1956).

[11] Girard Estate, 4 Pa. D. & C.2d 671 (Orphans' Ct. 1956).

court should exercise the *cy pres* power to strike the racial restriction.[12] The court held that the city in administering the trust was not performing a governmental function; that there was therefore no illegality of purpose; and that there had been no failure of purpose since there was no shortage of white applicants. The Pennsylvania Supreme Court affirmed.[13] The United States Supreme Court in a per curiam decision reversed and remanded,[14] holding that the city could not administer a racially discriminatory trust on the authority of *Brown v. Board of Educ.*[15] The orphans' court seized on the loophole and merely replaced the Board of City Trusts with thirteen private trustees.[16] Again the Pennsylvania Supreme Court affirmed.[17] A vigorous dissent argued that it was impossible to read Girard's will without reaching the conclusion that

[12] The case was argued primarily on other grounds. *Cy pres* was sought as an alternative remedy. For an excellent discussion of the sociological implications of *Girard* and the use of sociologists and political scientists as expert witnesses in this case, see Gordon, *The Girard College Case: Desegregation and a Municipal Trust*, 304 Annals 53 (1956).

[13] Girard Will Case, 386 Pa. 548, 127 A.2d 287 (1956). The court stated that "to sanction a change in the express terms of the will of Stephen Girard . . . would, in the opinion of the court, be a wholly unwarranted and improper decision unjustified by any principle of applicable law." *Id.* at 569-70, 127 A.2d at 297. See Note, 18 U. PITT. L. REV. 620, 630 (1957).

[14] Pennsylvania v. Board of Directors of City Trusts, 353 U.S. 230 (1957).

[15] 347 U.S. 483 (1954).

[16] This opinion is not reported.

[17] Girard College Trusteeship, 391 Pa. 434, 138 A.2d 844 (1958). In the first *Girard* decision the Pennsylvania court relied heavily on its holding that the city *could* legally administer this trust in support of its refusal to apply the *cy pres* doctrine. That holding was reversed by the United States Supreme Court; yet it does not appear that on remand of the case any attempt was made to revive the *cy pres* argument; at least the court in their final disposition of the case did not say so. Even the dissenter failed to make any reference to *cy pres* relief. The case was severely criticized in the reviews. See, *e.g.*, Notes, 34 N.Y.U.L. REV. 152 (1959); 33 NOTRE DAME LAW. 495 (1958). A like result was reached on similar facts in Mills v. City of Philadelphia, 52 N.J. Super. 52, 144 A.2d 728 (Super. Ct. 1958) (*cy pres* was not argued). See Note, 39 B.U.L. REV. 140 (1959); *cf.* Kerr v. Enoch Pratt Free Library, 149 F.2d 212 (4th Cir. 1945), *cert. denied*, 326 U.S. 721. *But see* Moore v. City & County of Denver, 133 Colo. 190, 292 P.2d 986 (1956), decided two years before *Girard*. In *Moore* the City of Denver had been appointed trustee of a trust establishing a college for "poor, white male orphans"; "orphans" was defined as children whose fathers were dead (obviously patterned after the Girard trust). Suit was brought to enlarge the class of beneficiaries since a large surplus had accumulated. Apparently, no objection was made to the "white" restriction. The court there pointed out that the plaintiffs had not shown that the testator's directions could not be observed and that *cy pres* had no application. There is no reported case indicating the fate of this trust after the *Girard* decisions.

he would have preferred deletion of the word "white" to removal of the city as trustee. The United States Supreme Court denied certiorari.[18]

LaFond v. City of Detroit,[19] a later case, involved a will providing for the establishment of a public playground for white children. The city accepted the gift provided the court would construe the will as giving it the right to make the facilities available to all children, without regard to race, color or creed. An evenly divided court affirmed a holding that the trust was void as against public policy and contrary to the laws of Michigan and the United States. Exercise of the *cy pres* power to strike the word "white" was denied on the ground that the testratrix had not evinced a general charitable intent.[20]

An analysis of the decision in the principal case in the light of the three cases discussed above indicates four conditions necessary to success: (1) the court must find that the testator manifested a "general charitable intent";[21] (2) there must be some factor beyond the trustee's control which makes it impossible, impractical or illegal for him to administer the trust so long as it contains the discriminatory provision;[22] (3) there must be some factor, which may or

[18] Pennsylvania v. Board of Directors of City Trusts, 357 U.S. 570, *rehearing denied*, 358 U.S. 858 (1958).

[19] 357 Mich. 362, 98 N.W.2d 530 (1959), noted with approval in Note, 35 NOTRE DAME LAW. 277 (1960); disapproved in Note, 37 U. DET. L.J. 418 (1960).

[20] Three Justices thought the testatrix' primary intent was not to benefit charity generally but to benefit white children. The dissenters thought that this position was unwarranted by the evidence and felt that *cy pres* should have been exercised to strike the word "white." 357 Mich. at 372, 98 N.W.2d at 535.

[21] As pointed out by Professor Bogert, the decisions on general charitable intent are impossible to reconcile. 2A BOGERT, *op. cit. supra* note 4, at § 437. Given practically identical language in a will, one court will find the requisite intent while another will hold it to be lacking. This intent seems to be a fictional disguise for a decision in which considerations of public policy may outweigh the sanctity of the right of testamentary disposition of property. It is much easier to avoid the weighing of these propositions by finding no "general charitable intent." But even here the court is often forced to determine that the testator would prefer that his trust fail rather than have it altered. This seems to be the case in Lafond v. City of Detroit, 357 Mich. 362, 98 N.W.2d 530 (1959). There is no substantial distinction to be seen in the language of that bequest and that of the principal case so far as "general charitable intent" is concerned.

[22] Thus, a distinction is drawn between the trustee who by his own act creates or contributes toward the impossibility, impracticability or illegality of the trust and one who merely renders a particular *remedy* impractical. See note 24 *infra*.

may not be within the trustee's control, which makes the appointment of a substituted trustee impractical, or contrary to the testator's intent;[23] (4) finally, there must be a finding that administration of the trust by the designated institutional trustee is the primary object of the testator[24]—otherwise the court will settle the trust on an institution willing to observe its restrictions.

Although the court in the principal case justified its application of the *cy pres* doctrine primarily on grounds of the testator's intent, it is submitted that public policy would also have been sufficient grounds for extension of the doctrine in this type of case.[25] Application of the *cy pres* doctrine is certainly preferable to declaring the trust void as in *LaFond,* and the almost universal criticism of *Girard* indicates that the court's refusal there to delete the racial

[23] This condition would seem to be peculiar to colleges or like eleemosynary institutions, for there the benefit to be derived from the trust may have a dual nature: not only are the eventual recipients of scholarships or loans, for example, benefitted by the trusts providing them, but the college is assisted in attracting able students through their existence. And the testator may have intended to confer both benefits without preference of one over the other. The court so held in the principal case and refused to make a choice between them.

[24] This would seem to be an extension of the *cy pres* doctrine to allow alteration of the trust rather than removal of the trustee where the trustee is *unable* to accept the trust as it stands, and it appears that the settlor selected that particular trustee for more than administrative purposes. In Connecticut College v. United States, 276 F.2d 491 (D.C. Cir. 1960), the testatrix had devised money to West Point for construction of an alumni house at a specified location on the campus; the academy wished to use the money to construct another building. The court refused to apply the *cy pres* doctrine, stating that "*cy pres* . . . does not authorize or permit a court to vary the terms of a bequest . . . merely because the variation will meet the desire or suit the convenience of the trustee. Nor may a trustee by his own act produce changed conditions which frustrate the donor's intention and still claim the gift through application of the *cy pres* doctrine." *Id.* at 497. *Accord,* President & Fellows of Harvard College v. Jewett, 11 F.2d 119 (6th Cir. 1925); Hicks Memorial Christian Ass'n v. Locke, 178 Ark. 892, 12 S.W.2d 866 (1929). *But cf.* Wilber v. Owens, 2 N.J. 167, 65 A.2d 843 (1949), discussed in Note, 63 HARV. L. REV. 348 (1949); Hoffman Estate, 15 Pa. D. & C.2d 295 (Orphans' Ct. 1959); *In re* MacFarland's Estate, 95 N.Y.S.2d 258 (Surr. Ct. 1950). The court in the principal case distinguished Connecticut College v. United States, *supra,* on the grounds that there the impossibility was within the control of the Academy and was actually created by its own act. Howard Sav. Inst. v. Peep, 34 N.J. 484, 510, 170 A.2d 39, 47 (1961).

[25] The lower court in the principal case observed that the New Jersey anti-discrimination statute had no application to the case since it expressly exempted private educational institutions from its provisions. Howard Sav. Inst. v. Trustees of Amherst College, 61 N.J. Super. 119, 160 A.2d 177 (Super. Ct. 1960). See N.J. STAT. ANN. tit. 18, ch. 25, § 5(j) (Supp. 1961).

restriction was out of step with the times.[26] Removal of the trustee designated by the testator will often be more of a subversion of his intent than altering the trust in other ways. And, as the principal case indicates, in some circumstances the appointment of substituted trustees might effectively destroy the main purpose of the trust.

If a state-supported college or university were to receive a bequest providing scholarships for "white" students only, the *Girard* case indicates clearly that the university, being an arm of the state, could not administer such a trust without violating the fourteenth amendment. If it be found that the testator intended primarily to benefit the university by his bequest and that the university refused to co-operate with a substituted trustee, the principal case seems to offer a workable and equitable solution. A college receiving a bequest establishing a trust restricted to a particular race or religion which it cannot legally or in good conscience administer, should not to be forced to choose between repudiating it altogether or accepting it as is, if it may do so at all. Ultimately the problem is resolved into a balancing of two interests thus brought into conflict: the interest of the college and the public in making the college's facilities available to qualified students without regard to race or religion, and the interest of the testator in the unfettered right to dispose of his property as he sees fit.[27] In most cases the former should outweigh the latter, for the advancement of learning and the protection of civil liberties would seem to be more worthy goals than blind respect for the supposed intent of the dead hand.

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Constitutional Law—Inadmissibility of Illegally Obtained Evidence in State Criminal Proceedings

In a recent decision[1] the United States Supreme Court held that

[26] See Clark, *Charitable Trusts, the Fourteenth Amendment and the Will of Stephen Girard,* 66 YALE L.J. 979 (1957), and Notes cited in notes 13 and 17 *supra.*

[27] See note 21 *supra.*

[1] Mapp v. Ohio, 367 U.S. 643 (1961). (Justice Stewart concurred in result only.) Cleveland police officers, having information that a person wanted for questioning about some bombings was hiding out in defendant's home, broke into defendant's home, waving a piece of paper which they claimed was a warrant, and thoroughly searched the house. During this search they found the obscene materials, for the possession of which the defendant, Mrs. Dollree Mapp, was convicted under the provisions of OHIO REV. CODE § 2905.34 (Supp. 1961). On trial no search warrant was pro-